NO. 93-1260

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In The

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

ALFONSO LOPEZ, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF TEXAS JUSTICE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF TEXAS JUSTICE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Texas Justice Foundation is a nonprofit corporation that provides free legal representation in cases involving the protection of individual rights and/or cases that seek to limit government to its proper role. Amicus is deeply concerned about federal interference in education. Amicus believes that the future of our country depends upon state, local, and parental control of our nation's schools and that constitutional constraints on

governmental power should be fully enforced. This case raises issues as to the scope of those constraints. The District Court upheld the constitutionality of the Gun-Free School Zones Act, in part, because it decided that education has an effect on interstate commerce. Should this Court adopt the unprecedented expansion of the commerce power sought by the United States, Congress may gain vast power over our entire educational system. The Foundation believes that this result would be contrary to the text, intent, and structure of the Constitution. Moreover, such a result would inevitably lead to further decline of our educational system.

SUMMARY OF ARGUMENT

The United States would have this Court believe that our country is in danger of economic balkanization because a small minority of the citizenry carries guns near schools. This position demonstrates just how far Commerce Clause jurisprudence has departed from the text and original intent of the Commerce Clause. That jurisprudence has now evolved to its inevitable conclusion. If this Court accepts the United States' contention that the commerce power extends to any subject having any remote effect on interstate commerce, then congressional power will be unlimited and Article I, Section 8 will effectively have been written out of the Constitution. "The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed. . . . " *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1805).

The United States claims that Congress may reach any activity that has an effect on interstate commerce no matter how small the effect. This position emasculates the text of the Commerce Clause, rendering the three enumerated categories of commerce both redundant and unnecessary. This interpretation would likewise render Article I, Section 8 meaningless because all of the

enumerated powers under Article I have some relationship to interstate commerce.

The structure of the Constitution reflects the federalist values of the Framers, and is inconsistent with a view of the Commerce Clause that would grant Congress unlimited power. The Founders constrained Congress' power to specific enumerated powers to guard against undue expansion of federal power. All other powers were to be reserved to the states. If the United States' position is adopted, the citizens of this country will lose the valuable check that federalism provides against government encroachment on our liberties.

The United States' expansive interpretation of the Commerce Clause stems from the interpretation of the Necessary and Proper Clause in *United States v. Darby*, 312 U.S. 100 (1941). Contrary to the United States' position, the Necessary and Proper Clause is not a mechanism to expand the enumerated powers of Article I, as this Court has held in other cases involving Congress' enumerated powers. The Commerce Clause should be limited to its proper sphere.

The current approach under the Commerce Clause requires courts to defer to congressional judgment that a regulated activity has an effect upon interstate commerce, provided that there is any rational basis for that judgment. This standard grants judicial power to the legislative branch and removes an important check on legislative power. Deference to the judgment of a coequal branch of government on a specific issue is only appropriate where the Constitution gives that branch the power to decide that issue. Here, the Constitution grants the Judicial Branch the power to decide whether Congress is acting within its enumerated powers, so no deference is due. Simply put, "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it." *Marbury*, 5 U.S. at 177.

Because the Judicial Branch has the constitutional duty of preventing Congress from acting outside its enumerated powers, heightened scrutiny is appropriate when considering whether Congress has jurisdiction to act under the Commerce Clause. This Court should adopt a test similar to that applied in dormant Commerce Clause cases. Those cases take a narrow view of what may properly be regarded as regulation of commerce among the several states. The proposed test would bring the jurisdictional inquiry under the Commerce Clause into harmony with the approach in dormant Commerce Clause cases.

ARGUMENT

I. THE COMMERCE POWER DOES NOT EXTEND TO INTRASTATE ACTIVITIES THAT HAVE A TRIVIAL IMPACT ON INTERSTATE COMMERCE.

A. The Overreaching Construction of the Commerce Clause Urged By the United States Emasculates the Constitutional Text and Ignores the Intent of the Commerce Power.

The United States asks this Court to make an unprecedented extension of the power of Congress to regulate interstate commerce. Essentially, the United States contends that the Commerce Clause allows Congress to regulate any activity that has an inconsequential effect on interstate commerce, no matter how attenuated the chain of causation. *See* Brief of United States at 12-25. The Fifth Circuit properly observed that such an expansion of the commerce power would make its scope unlimited. *United States v. Lopez*, 2 F.3d 1342, 1362 (5th Cir. 1993). Indeed, the immense power claimed by the United States does not comport with either the text or purpose of the Commerce Clause. The Constitution gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const., art. I, § 8, cl. 3. It does not give Congress the power to regulate commerce and anything having an effect thereon. The Gun-Free School Zones Act has nothing to do with interstate commerce. The Commerce Clause is merely a pretext for yet another incursion by Congress into an area reserved to the states under the Constitution.

The discussion below demonstrates that the Constitution does not grant Congress the sweeping powers sought by the United States. First, the United States seeks an interpretation inconsistent with the text of the

Commerce Clause itself. Second, that interpretation would render other provisions of Article I meaningless. Third, the asserted scope of the Commerce Clause runs counter to this Court's interpretation of other enumerated powers. Finally, this approach is incompatible with the original intent of the Commerce Clause.

1. Text of Commerce Clause

The inquiry into the meaning of the Commerce Clause begins with the text. *Reid v. Covert*, 354 U.S. 1, 8 n.7 (1957) (where language of Constitution is clear and unambiguous it must be given its plain evident meaning). The meaning of the term "commerce" is settled. In *Gibbons v. Ogden*, this Court explained that "commerce" encompasses more than simply traffic in commodities; it encompasses "intercourse." 22 U.S. (9 Wheat.) 1, 189-90 (1824). In other words, the term applies to the instrumentalities of commerce used to carry commodities from one place to another. The *Gibbons* definition of commerce is consistent with both the views of the Founders and of the ordinary meaning of the term "commerce" at the time of the Constitution's drafting. *See* Richard A. Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387, 1389 (1987).

The Commerce Clause thus anticipates Congressional regulation of trade and the instrumentalities of trade. The accepted definition of "commerce" does not, however, contemplate Congressional regulation of anything that happens to affect commerce. Congress' power is restricted to "that commerce which concerns more states than one." *Gibbons*, 22 U.S. (9 Wheat.) at 194. As this Court explained,

> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state,

> because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state.

Gibbons, 22 U.S. (9 Wheat.) at 194-95.

The *Gibbons* opinion also implies that the Commerce Clause can reach internal commerce which may "extend to or affect other states." 22 U.S. (9 Wheat.) at 194. This much misunderstood statement does not support the broad expansion of the commerce power urged by the United States; it only recognizes that internal *commerce* may affect other states. *Id.* The Gun-Free School Zones Act, however, does not even regulate internal commerce. Carrying a gun near a school has no relation to a commercial transaction "carried on between man and man in a state." *Id.* Even if *Gibbons* can be read to allow Congress to regulate internal commercial transactions, it cannot be read to allow Congress to regulate any sort of intrastate behavior.

In addition, the passage concerning effects on commerce has often been misinterpreted. In *Gibbons*, this Court merely recognized that portions of interstate transactions occur internally in a single state. As goods travel through the several states in the stream of commerce, a portion of that journey necessarily occurs completely within a single state. Accordingly, state and local laws affecting only goods travelling within a state, can directly interfere with the stream of interstate commerce. *See Epstein*, *supra*, at 1405. This interpretation of *Gibbons* is buttressed by the later observation in that opinion that although inspection laws may have a "considerable influence on commerce," the

commerce power does not extend to such internal matters. 22 U.S. (9 Wheat.) at 203. The commerce power thus extends to activities, such as the franchise rights at issue in *Gibbons*, that interfere with actual interstate commercial transactions. It does not extend to purely localized activities that have some nebulous relation to commerce, such as carrying a gun near a school.

An interpretation of the Commerce Clause that brings within its scope any activity having any effect whatsoever upon interstate commerce would render the text of the clause meaningless. The Commerce Clause also grants Congress the power to regulate commerce with foreign nations and with Indian tribes. Any activity that affects commerce of one category in some attenuated way would necessarily affect the other two categories. This result renders the separately enumerated categories redundant. The interpretation urged by the United States, therefore, contradicts the principle that "the Commerce Clause draws a clear distinction between 'States' and 'Indian tribes.'" *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989); *see Epstein*, *supra*, at 1393-94. In addition, every activity affects commerce in some insignificant way. *Lopez*, 2 F.3d at 1362. Had the Founders intended the commerce power to be unlimited, enumerating three categories of commerce for Congress to regulate would have been unnecessary. *Gibbons*, 22 U.S. (9 Wheat.) at 194-95.[1]

2. Text of Other Constitutional Provisions

The United States' interpretation of the Commerce Clause would make numerous other constitutional provisions meaningless. Extending the Commerce Clause

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[1] The original definition of commerce in *Gibbons* does not render the three categories of commerce either redundant or unnecessary. *Epstein, supra*, at 1394.

to reach any matter that affects commerce would render the enumerated powers nugatory. For example, Congress is granted the power "to establish . . . uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. Bankruptcies indisputably have a tremendous affect on commerce. The Founders were aware that bankruptcy strongly affects commerce and is "intimately connected" therewith. The Federalist, No. 42, at 287 (James Madison) (Jacob E. Cooke ed., 1961). Had the Founders intended the commerce power to reach anything which affects commerce, the bankruptcy power would have been unnecessary.

Numerous other Article I powers also concern subjects having a substantial effect upon commerce. *E.g.*, U.S. Const. art. I, § 8, cl. 5 (power to coin money); U.S. Const. art. I, § 8, cl. 8 (power to grant intellectual property rights). These powers are all superfluous and without effect if the commerce power extends to any matter that has any effect upon commerce. Such an interpretation would violate the traditional rule that the Constitution should not be interpreted to render other portions of the Constitution meaningless.[2] *E.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

3. Interpretation of Other Enumerated Powers

The overbroad interpretation of the Commerce Clause urged by the United States also does not comport with the narrow interpretation given to other enumerated powers under Article I. The most analogous Article I power in terms of its scope is the power "[t]o make rules

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[2] The Fifth Circuit recognized that any interpretation of the Commerce Clause that gave it unlimited reach would render the Tenth Amendment meaningless because there would be nothing left upon which the Tenth Amendment could operate. *Lopez*, 2 F.3d at 1347. This Court cannot reverse the decision of the Fifth Circuit without transforming the Tenth Amendment into a nullity.

for the . . . Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. Congress' power pursuant to this clause is no less plenary than under any other grant of congressional authority. *Solorio v. United States*, 483 U.S. 435, 441 (1987). Indeed, judicial deference is at its "apogee" when Congressional authority under Clause 14 is challenged. *Id.* at 447. Similarly, Congress' power under the Commerce Clause is plenary. *E.g., Hodel v. Virginia Surface Min. & Reclam. Ass'n.*, 452 U.S. 264, 276 (1981). Despite the similar broad scope of these enumerated powers, Congress has been denied the power under Clause 14 to regulate any matter that may *affect* the land and naval forces.

In *Reid v. Covert*, this Court held that Congress could not subject dependents of military personnel to court-martial. 354 U.S. 1 (1957). The *Reid* decision flatly rejected the contention that Congress could regulate any matter having an *effect* on the land and naval forces: "the Constitution does not say that Congress can regulate 'the land and naval forces and all other persons whose regulation might have some relationship to maintenance of the land and naval forces.'" *Id.* at 30. Similarly, the Constitution does not say that Congress can regulate 'commerce among the several states and all other activities whose regulation might have some relationship to commerce.' The interpretation of Clause 14 in *Reid* is inconsistent with previous interpretations of the Commerce Clause and with the interpretation now urged by the United States.

4. Intent of Commerce Clause

The original purpose of an enumerated power is important. To be faithful to the underlying premises of the Constitution, courts should be aware of those premises when interpreting a particular provision. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985); *see*

also Id. at 563 n.5 (Powell J., dissenting). The purpose of the Commerce Clause was to maintain free trade among the several states. *Cotton Petroleum Corp.*, 490 U.S. at 192; *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). The Founders feared that, left to their own devices, states would interfere with interstate commerce and create disagreements between themselves. The Federalist, No. 7 at 39-40. (Alexander Hamilton) (Jacob E. Cooke ed. 1961). The Founders foresaw the need for national control to prevent animosity between the several states. The Federalist, No. 22 at 137 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961); *Baldwin v. GAF Seelig, Inc.*, 294 U.S. 511, 522 (1935). This limited purpose does not suggest the vast expansion of congressional power sought by the United States.

The Gun-Free School Zones Act plainly falls outside the original purpose of the Commerce Clause. The Act has nothing to do with promoting the free flow of commerce or with preventing state control over a subject which would interfere with the flow of commerce.

B. Federalist Values Reflected in the Structure of the Constitution Suggest a Narrow Interpretation of the Commerce Clause.

The unlimited power sought by the United States under the Commerce Clause conflicts with the structure of the Constitution and the values of federalism reflected therein. If those values are to survive, the Judicial Branch must maintain control over Congressional power as it provides the only check on that power.

The Founders intended that federal power be constrained to a limited sphere. The Federalist, No. 46 at 317. (James Madison) (Jacob E. Cooke ed. 1961). In furtherance of that goal, the Federal Government was granted only enumerated powers for the express purpose of controlling the "looseness of vague grants of power." *See Epstein, supra*, at 1396. As Madison explained, "The

powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite." The Federalist, No. 45 at 313 (James Madison) (Jacob E. Cooke ed., 1961); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). States were to have broad powers over things concerning the lives, liberties, and property of the people. *Garcia*, 469 U.S. at 570-71 (Powell, J., dissenting) (citing The Federalist, No. 45).

The Founders feared that a powerful national government "eventually would eliminate the States as viable political entities." *Id.* at 568. They recognized that people would have a stronger affinity for state government and that state government would be more responsive to the people. The Federalist, No. 17 at 107. (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Federalism assures that the government will be more sensitive to the diverse needs of a heterogeneous society. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). "The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them." *Garcia*, 469 U.S. at 575 N. 18 (Powell, J., dissenting). State governments have been paralyzed in recent years due to overreaching by Congress and preemption of state control.[3]

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[3] The notion that the values of federalism must give way as the Constitution is adapted to modern times is not well founded. The national economy has always been interrelated in the relevant manner as purely local actions have always had some small effect on interstate commerce. *See Epstein, supra*, at 1396. As Congress continues to usurp more state authority in attempts to further micro-manage this country, the values of federalism are even more imperative. Those values must be affirmed in this case, lest this Court arm Congress with a further weapon to restrict the liberties of the people. As modern problems become more complex and difficult to control, states must be allowed to exercise their constitutional freedom to experiment and

Most importantly, federalism protects fundamental liberties. *Gregory*, 111 S. Ct. at 2400. This protection stems from the combined effects of the responsiveness of state and local governments to the needs of citizens and from federalism's tendency to make government compete for citizens. States are reluctant to restrict liberties either (1) for fear that people will leave and move to other states, or (2) for fear that its own citizens and/or corporations will be disadvantaged *vis a vis* the citizens of other states.

For this check against tyranny to work, however, there must be a healthy balance of power between the states and the federal government. *Gregory*, 111 S. Ct. at 2400; *New York v. United States*, 112 S. Ct. 2408, 2431 (1992). Adopting the interpretation of the Commerce Clause suggested by the United States would eliminate this safeguard and make federal power unlimited. An overambitious Congress should not be allowed, under the guise of regulating commerce, to destroy the federalist structure created by the Founders. If the Gun-Free School Zones Act is constitutional, federalism is dead.

C. The Necessary and Proper Clause Does Not Expand the Enumerated Powers of Congress Under Article I, Section 8.

The United States begins its argument by quoting the infamous decision in *United States v. Darby*: "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them

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devise their own solutions to these problems as Congress cannot adequately take into account the myriad of local variables that affect such problems.

appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." 312 U.S. 100, 118 (1941); *see also Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. at 281.; *United States v. Wrightwood Dairy*, 315 U.S. 110, 119 (1942). As authority for the quoted passage, the *Darby* Court cited *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). *See Darby*, 312 U.S. at 118-19. In *McCulloch*, this Court was interpreting the Necessary and Proper Clause of the Constitution. *See generally McCulloch*, 17 U.S. (4 Wheat.) at 411-425. Accordingly, the Necessary and Proper Clause is the source of constitutional authority for extending Congress' power over commerce among the several states to encompass the power to regulate anything that *affects* commerce.

The United States' interpretation of the Necessary and Proper Clause is inconsistent with the very source of authority upon which *Darby* relies, *McCulloch v. Maryland*. Its position also conflicts with the original intent of the Necessary and Proper Clause and later interpretations of that clause in the context of other enumerated powers under Article I.[4]

Those opposing ratification of the Constitution feared precisely the type of expansion of the enumerated federal powers that the United States seeks here. During

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[4] The United States stretches the elastic principle of *Darby* to the breaking point. Under *Darby*, congressional power only extends to those intrastate activities which *so affect* interstate commerce to make regulation of them *appropriate*. *Darby*, 312 U.S. at 118. (emphasis added). Later decisions imply a limit on what activities Congress may appropriately reach under the Commerce Clause. As stated in *Maryland v. Wirtz*, "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad, general regulation of state or private activities." 392 U.S. 183, 196 (1968). The Gun-Free School Zones Act seeks to do just that. Any impact on commerce due to the carrying of guns in a school zone is "relatively trivial" if any impact exists at all.

the debates over ratification, the Necessary and Proper Clause was a source of "much virulent invective and petulant declamation against the proposed constitution . . ." The Federalist, No. 33 at 204 (Alexander Hamilton)(Jacob E. Cooke ed. 1961). People feared that this clause could be used to expand federal power and gradually destroy local governments and exterminate liberty. *Id.* Hamilton replied, "[I]t may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government and vesting it with certain specified powers." *Id.* In other words, the granting of enumerated powers to Congress implies that Congress should have the power to execute those powers.

Hamilton's reassurance strongly suggests that the Founders did not intend the Necessary and Proper Clause to *expand* the scope of the enumerated powers. If, in the absence of this clause, Congress would have the same scope of power by implication as it does with the clause included, the Necessary and Proper Clause can not expand those powers otherwise enumerated. This interpretation is confirmed by Madison: "For in every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object; and be often properly varied whilst the object remains the same." The Federalist, No. 44 at 304 (James Madison)(Jacob E. Cooke ed. 1961). According to Madison, the scope of Congress' enumerated powers (the object) remains unchanged. Earlier in the same paragraph, Madison states that the purpose of this clause was to avoid having to write "a complete digest of laws on every subject to which the Constitute relates." *Id.* The Necessary and Proper Clause thus grants Congress the power to employ

"particular powers" in exercising its general powers, strongly suggesting that "particular powers" are narrower in scope than general powers.

The United States' position contradicts the Founder's intent, as it reads the Necessary and Proper Clause as granting a significant expansion of Congress' power under the Commerce Clause. This expansive interpretation results from *Darby* and an undue extension of the famous statement in *McCulloch* upon which *Darby* relies, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional." 17 U.S. (4 Wheat.) at 421.

To justify an exercise of congressional power, *McCulloch* requires (1) that the end be within the scope of the Constitution, (2) that the means be plainly adapted to that end, and (3) that the means consist with the letter and spirit of the Constitution. The standard sought by the United States contradicts each of these requirements. First, it extends the power of Congress beyond the scope of the Constitution. The *Darby* decision does not hide this fact as it declares, in clear contradiction to the text of the Constitution, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states." *Darby*, 312 U.S. at 118. Second, the means are not adapted to the end of regulating commerce. Regulating activities which have a remote effect on interstate commerce are not plainly adapted to the end of regulating commerce. Rather, they allow the use of the Commerce Clause as a pretext to regulate purely intrastate activities.[5] Third, the expansion of

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[5] *McCulloch* also dictates that if Congress passes laws for the accomplishment of objects not entrusted to it under the Constitution under the pretext of executing its enumerated powers, such laws would be unconstitutional. *McCulloch*, 17 U.S. (4 Wheat.) at 423. The

congressional power sought by the United States, as discussed above, does not consist with the letter and spirit of the Constitution. *See* sections I.A. and I.B.

The passage from *McCulloch* relied upon in *Darby* merely restates the principles expressed by Hamilton and Madison in the Federalist Papers. An 'end' refers to one of the enumerated powers of Congress in Article I. For example, in *McCulloch*, the bank at issue was created for the 'end' of raising revenue and applying it to a national purpose under Article I, Section 8, Clause 1. *See* 17 U.S. (4 Wheat.) at 409. A 'means' is simply a particular power used to exercise a more general enumerated power, or a tool used in exercising an enumerated power. The 'means' in *McCulloch* was a bank which allowed conveying of money from place to place. Other examples illustrate the distinction between 'means' and 'ends'. The Court of Claims is a means to pay the debts of the United States under Article I, Section 8, Clause 1, while the Court of Customs and Patent Appeals was a means to collect duties under Article I, Section 8, Clause 1, *See Glidden v. Zdanok*, 370 U.S. 530, 591 (1962) (Douglas, J., dissenting).

When considering whether a specific law passed by Congress is within its jurisdiction under Article I, the question is whether the law regulates subject matter which Congress is empowered to regulate.[6] *See McCulloch*, 17

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position of the United States allows passage of such laws. Under the pretext of regulating commerce, Congress regulates intrastate activities not entrusted to it, but reserved to the states under the Constitution. The Gun-Free School Zones Act is only one example.

[6] If the law merely establishes an agency or an enforcement mechanism, the question is whether the agency or enforcement mechanism operates on subject matter that Congress may reach under Article I. The analysis in *McCulloch* concerning the bank exemplifies such an inquiry. Here, Congress is regulating behavior--the carrying of a gun in a school zone. As described in the text, the constitutional issue is whether this behavior falls within an enumerated category of congressional regulation under Article I. Congress has also used an

U.S. (4 Wheat.) at 421 & 423. In other words, the jurisdictional question is whether the *action* that Congress is regulating falls within an enumerated category. The *Darby* standard, however, is bootstrapping. It considers the regulation of subject matter that has an effect on commerce as a 'means' to the 'end' of regulating commerce. A means to an end, however, is a specific *way* in which the subject matter is regulated. Regulating subject matter that has an effect on commerce is, in actuality, an 'end' in itself. *Darby*, therefore, places additional ends within the reach of Congress simply because they relate in some way to other ends properly within the power of Congress.

The United States' position is also inconsistent with other decisions of this Court interpreting the Necessary and Proper Clause in light of other enumerated powers under Article I. As noted above, Congress has plenary power under Article I, Section 8, Clause 14 to make rules for the regulation of the land and naval forces. Despite the plenary scope of this power, the Necessary and Proper Clause has been interpreted in connection with this power in a way which squarely contradicts the United States' position.

In *Reid v. Covert*, the issue was whether Clause 14 allowed Congress to court-martial dependents of military personnel who had committed a capital offense. 354 U.S. 1 (1957). This Court first observed that if clause 14 is given its natural meaning, the enumerated power did not extend to civilians. *Id.* at 19. As discussed above, if the

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enforcement mechanism, a criminal penalty, as a 'means' to enforce the regulation. Although a criminal penalty is a legitimate means of accomplishing a constitutionally permitted end, the issue remains as to whether the end (the regulation of an action) falls within an enumerated power. Because the behavior--carrying a gun in a school zone--is not part of a commercial transaction among two states or an instrumentality of such a transaction, such behavior does not fall within the 'end' of regulating commerce among the several states.

commerce power is given its natural meaning, it does not extend to any activity which may affect commerce. The government also argued that the Necessary and Proper Clause allowed Congress to subject civilians accompanying military personnel to court-martial. *Id.* at 20. *Reid* rejected the argument that Congress could court-martial civilians simply because they had some relationship to the "land and naval forces." *Id.* at 30. Certainly, if Congress may not regulate activities which affect the land and naval forces, it may not regulate activities which merely affect commerce among the several states. The later decision in *Kinsella v. Singleton*, 361 U.S. 234 (1960), strengthens this conclusion.

In *Kinsella*, the issue was whether Congress could extend the court-martial power to dependents of military personnel in non-capital cases. The government alleged that it was necessary to court-martial dependents charged with non-capital crimes because these dependents "affect the military community as a whole." *Id.* at 238. The special status of dependents in the military community allegedly required disciplinary control and the effectiveness of this control supposedly depended upon the court-martial procedure. *Id.* at 239.

The substantial effect argument was rejected. This Court held that "[i]f the exercise of the power is valid, it is because it is granted in Clause 14, not because of the Necessary and Proper Clause. The latter clause is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution.'" *Id.* at 247. The *Kinsella* holding contradicts the United States' position in several ways. First, the quoted passage establishes that for an exercise of power to be valid, the power must be an enumerated one. This axiom is consistent with the holding in *Reid* that Congress should not be granted additional powers under the Necessary and Proper Clause

which are not otherwise granted by the constitutional text. But, *Kinsella* goes further. It holds, consistently with the Founders' intent, that the Necessary and Proper Clause is not itself a grant of power.

The *Reid* interpretation of the Necessary and Proper Clause was distinguished from *McCulloch*, because in *McCulloch*, no specific restraints on the governmental power stood in the way.[7] 354 U.S. at 22. Clause 14, by its terms, limits military jurisdiction to members of the land and naval forces. *Id.* at 22. The same basis for distinguishing *Reid* from *McCulloch* may be applied to the Commerce Clause. Just as Clause 14 limits military jurisdiction to members of the land and naval forces, the language of the Commerce Clause limits commerce jurisdiction to commerce among the several states.

Reid and *Kinsella* properly interpreted the Necessary and Proper Clause. *Kinsella* recognizes that the Founders never intended the Necessary and Proper Clause to be a grant of power in itself. 361 U.S. at 247; *see also, Reid*, 354 U.S. at 20-21 (can not extend military jurisdiction beyond the scope of the power described in Clause 14). These well-reasoned decisions can not be reconciled with the position of the United States, which would greatly expand the commerce power based upon the Necessary and Proper Clause.

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[7] The *Reid* opinion also notes that Article III § 2 and the Fifth and Sixth Amendments required certain express safeguards designed to protect persons from oppressive governmental practices. *Id.* at 22. These safeguards could not be given in a military trial. This alleged difference from *McCulloch* begs the question. The jurisdictional issue in *Reid* was whether Congress could use its power over the land and naval forces to court-martial dependents of military personnel. If clause 14 extended to such persons, then the protections of Article III § 2 and the Fifth and Sixth Amendments would not apply, just as they do not apply to court-martial proceedings against military personnel.

II. TO PROTECT THE STATES AGAINST AN IMPROPER EXPANSION OF THE COMMERCE POWER, CONGRESS SHOULD HAVE THE BURDEN OF SHOWING THAT IT IS EXERCISING ITS ENUMERATED POWERS.

A. Rational Basis Review Makes Congress the Arbiter of Its Own Power.

The current standard for reviewing congressional jurisdiction under the Commerce Clause dilutes the constitutional power of judicial review and upsets the balance of power carefully crafted by the Framers. When reviewing congressional power to legislate under the Commerce Clause, this Court defers to a congressional finding that the regulated activity affects interstate commerce if there is any rational basis for such a finding. *Virginia Surface Min. and Reclam. Ass'n.*, 452 U.S. at 276. "The judicial task is at an end once the Court determines that Congress acted rationally in adopting a particular regulatory scheme." *Id.*

Rational basis review effectively insulates congressional power from meaningful review. Congress need only craft a rationalization to establish a rational basis. This case is no exception. The United States begins by contending that the economic consequences of crime are substantial and through the mechanism of insurance spread throughout the population. Brief of United States at 17. Next, the United States asserts that Congress could reasonably determine that prohibiting gun possession around school premises would reduce the

incidence of firearm violence.[8] The links to interstate commerce are strained.[9]

The Judicial Branch plays a crucial role in "protecting the States from federal overreaching." *Garcia*, 469 U.S. at 567 (Powell, J, dissenting). When considering questions of the separation of powers between coordinate branches of the federal government, additional checks on congressional power normally exist. For example, where the question relates to congressional encroachment on executive power, the President can protect his own powers with a veto. *See e.g. I.N.S. v. Chadha*, 462 U.S. 919 (1983). Thus, the checks and balances created by the constitutional structure act to prevent one branch from usurping the power of another branch without judicial intervention. The Judicial Branch, on the other hand, is the only check against federal encroachment on state powers, especially because states must respect federal law under the supremacy clause.

When determining whether Congress has exceeded its enumerated powers under Article I, no deference should be given to congressional judgement. *Oregon v. Mitchell*, 400 U.S. 112, 204 (1970) (Harlan, J., dissenting). Although deference is justified in other areas, congressional judgment should have no bearing in considering congressional jurisdiction. "Judicial deference

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[8] Curiously, this rationalization fails to explain why congressional legislation on the subject is more effective than state legislation. As the 5th Circuit observed, Texas has had a law since 1974 making Lopez's actions a felony. *Lopez*, 2 F.3d at 1345.

[9] An analogy to proximate cause illustrates the problem. Rational basis review allows Congress to legislate under the jurisdiction of the commerce clause even when there is no proximate relationship between the activity regulated and the free flow of goods between the several states. The link between carrying a gun near a school and interstate commerce is certainly more attenuated than that between the action of the Defendant and the injury of the Plaintiff in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (N.Y. 1928).

is based, not on relevant fact finding competence, but on due regard for the decision of the body constitutionally appointed to decide." *Id.* at 207 (Harlan, J., dissenting). Judicial deference is appropriate when Congress is determining *how* its power should be exercised, because the Constitution gives this responsibility to Congress. Judicial deference is inappropriate when the issue is *whether* Congress has the power to regulate because the Constitution gives the Judicial Branch the responsibility of making sure Congress stays within the bounds of its power.

To prevent Congress from overreaching, the Constitution gives the Courts both the power and duty to determine whether acts of Congress have exceeded those enumerated powers. *See Marbury*, 5 U.S. at 177; *Mitchell*, 400 U.S. at 204-205 (Harlan, J., dissenting). This power and duty stems from the structure of the Constitution. The Judicial Branch interprets the Constitution to determine whether Congress has a specific power. Once this Court has determined Congress has a given power, it properly defers to Congress' decision as to how to implement that power. *Mitchell*, 400 U.S. at 204-205 (Harlan, J., dissenting).

Amici, 16 members of the United States Senate and 34 members of the United States House of Representatives, rely on *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993), for the proposition that legislative judgments may be based upon rational speculation unsupported by evidence or empirical data. (Brief of Amici at 7). This argument confuses the distinction between (1) how Congress chooses to exercise its powers and (2) whether the Constitution grants Congress the power to exercise. In the passage quoted from *Beach*, the issue was whether a statute violated the Equal Protection Clause. There, deference to Congress is appropriate. In exercising its powers, Congress must necessarily make certain classifications. Because the legislature is better suited to make such classifications

based upon the consideration of numerous factors, Courts defer to those classifications as long as they are not suspect and as long as there is a rational basis for them.

In determining whether Congress exceeded its powers under the Commerce Clause, however, a court is not determining why Congress legislated in a certain way. The issue is jurisdiction to pass the law, not the merits of the law. Because the Constitution gives the courts power to decide whether legislation is within the scope of federal jurisdiction under the Constitution, no deference to Congress is justified. *See Marbury*, 5 U.S. (1 Cranch) at 177. Congress decides *how* to legislate, this Court decides *whether* it can legislate.

Rational basis review is also inconsistent with the approach to jurisdictional questions involving the separation of powers between branches of the federal government. For example, courts do not defer to congressional judgment when deciding questions of jurisdiction involving the legislative and executive branches. *See e.g., I.N.S. v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976). Just as no deference is due to Congress' judgment of whether it has exceeded its power under the Constitution *vis a vis* other coequal branches of government, no deference is due to Congress' judgment as to whether it is acting within the scope of its enumerated powers under Article I.[10]

Deference to congressional judgment as to its power to legislate under the Commerce Clause is inappropriate. Such deference takes away from the

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[10] The rational basis approach under the commerce power also conflicts with the approach to other enumerated powers under Article I. Courts normally make an independent review of whether Congress exceeded its powers. For example, no deference is accorded to congressional judgment under Article I, Section 8, Clause 14. *See e.g. Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234, 244-46 (1960) (questioning necessity and effect of court-martial jurisdiction).

judicial power and gives judicial power to Congress. This approach is incompatible with the system of checks and balances crafted by the Founders. *Chadha*, 462 U.S. at 957-58. The time has come to adopt a standard consistent with the text of the Constitution, the intent of that text, and the overall constitutional structure.

B. Heightened Scrutiny Is Appropriate When Considering the Reach of the Commerce Power.

Under the 'dormant Commerce Clause' line of cases, this Court has taken a narrow view of the meaning of 'commerce among the several states.' Indeed, the dormant Commerce Clause doctrine stems from the intent of the Commerce Clause, its text, and the overall structure of the Constitution. When considering Congress' jurisdiction under the Commerce Clause, a standard of review should be employed that is consistent with, and congruent to, the dormant Commerce Clause line of cases.

Dormant Commerce Clause doctrine rests upon the recognition that the Commerce Clause, besides authorizing Congress to regulate commerce among the several states, also prevents the states themselves from regulating commerce among the several states and thereby interfering with congressional power. *See e.g. Great Atlantic and Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). This limitation results from the realization that "when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." *Gibbons*, 22 U.S. (9 Wheat.) at 199-200.

A state law is invalid, then, when that state law is, in reality, regulating commerce among the several states. If, as the United States contends, congressional power under the Commerce Clause extends to any private activity that has any effect on interstate commerce, then

the principle behind the dormant Commerce Clause attains a vast destructive potential. Because every state law has at least some small effect on interstate commerce, all state laws would be potentially unconstitutional under the interpretation of the Commerce Clause offered by the United States. After all, if any activity affects commerce, states are always doing what Congress is empowered to do when they pass any law because all laws have some small relation to commerce.[11]

To bring the dormant Commerce Clause cases into harmony with the approach to the question of congressional jurisdiction under the Commerce Clause, a new test must be devised for deciding jurisdictional questions. The approach in the dormant Commerce Clause cases is consistent with the Constitution, while the current approach to jurisdictional questions is not.

Pursuant to dormant Commerce Clause doctrine, "not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the states." *Great Atlantic and Pacific Tea Co.*, 424 U.S. at 371. Similarly, when deciding whether Congress has jurisdiction to legislate under the Commerce Clause, a showing of a substantial effect on interstate commerce should be required. *Virginia Surface Min. and Reclam. Ass'n*, 452 U.S. at 310-11 & 312 (Rehnquist, J, concurring); *see also NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). "Activities local in their immediacy do not become interstate and national because of distant repercussions." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935). Congress may not use a

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[11] As previously observed, Texas has a law making Mr. Lopez's actions a felony. If, as the United States claims, guns in school zones truly have a substantial effect upon interstate commerce, it is unclear why the Texas law is constitutional under the dormant Commerce Clause line of cases.

relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. *Lopez*, 2 F.3d at 1361. Just as remote and indirect links to health do not justify obstructing commerce, remote links to commerce do not justify interfering with state sovereignty. *See Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511, 524 (1935). There is no two-tiered definition of commerce. The same definition should be used when deciding questions in dormant Commerce Clause cases as when deciding issues of federal jurisdiction. *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979).

Of course, if Congress is directly regulating interstate commerce as defined above, there is no need to show a substantial effect on commerce. Given Congress' plenary power to regulate commerce among the several states, the jurisdictional inquiry is over once a court determines that Congress is directly regulating interstate commerce.

The test should require further inquiry, however, when Congress is only regulating an activity having a substantial effect on commerce. Besides demonstrating that the regulated activity substantially affects commerce, Congress should be required to show a compelling need for federal regulation. After such a showing is made, courts should weigh the intrusion on state power against the putative federal benefits. The degree of intrusion allowed should depend upon the nature of the federal interest and whether the states can adequately deal with the problem alone.

The proposed test is consistent with the approach in dormant Commerce Clause cases. Initially, the burden is placed on Congress to justify its intrusion into state affairs. *See Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 353 (1977); *Hughes*, 441 U.S. at 336. To be consistent with the above analysis regarding deference to Congress over questions of congressional jurisdiction, a court should make its own determination of whether a substantial effect on commerce has been shown.

This approach is followed in dormant Commerce Clause cases. *See e.g. Hunt*, 432 U.S at 353-354; *Hughes*, 441 U.S. at 336 (court "will determine for itself the practical impact of the law.)". Like dormant Commerce Clause cases where a state receives less deference when attempting to exercise federal powers, less deference should be given to Congress where it is intruding into the domain of state powers. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981).

The proposed test would also allow courts to weigh the intrusion on state sovereignty against the putative federal benefits. Such a balancing test under the Commerce Clause has been previously approved. *See e.g. Garcia*, 469 U.S. at 562-63. In making this review, the central inquiry is how closely the challenged action implicates the central concerns of the Commerce Clause. *Id.* at 563 n.5. Congress should, therefore, be required to show a close relation between the regulated activity and the central concern of the Commerce Clause, i.e. promoting free trade among the several states. The compelling need for federal regulation should then be weighed against the intrusion on state sovereignty. *E.g. Kassel*, 450 U.S. at 670-71.

In determining whether the need for federal regulation is compelling, courts should consider whether the states are capable of addressing the problem on their own. Courts will only sustain state regulations that discriminate against interstate commerce if they are essential to protect a compelling state interest. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951). Similarly, where intrusion into state sovereignty is not essential, a federal law should be struck down. Courts should also consider whether the federal interest could be promoted with a lesser impact on state sovereignty. *See Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970).

The Gun-Free School Zone Act does not pass constitutional muster under this test. First, the United

States has not come close to meeting its burden to show a substantial effect on interstate commerce. *See Lopez*, 2 F.3d at 1366-68. In addition, the United States has not shown a compelling need for federal regulation. Even if guns in school zones are a serious problem, there is no reason why the states can not handle this problem on their own. Indeed, as observed above, and by the 5th Circuit, Texas has a statute making Mr. Lopez's actions a felony.

III. THIS CASE PRESENTS A PROPER OCCASION TO REEXAMINE PRECEDENT UNDER THE COMMERCE CLAUSE.

The time has come for the Judicial Branch to reassume its role in preventing Congress from exercising powers not entrusted to it under the Constitution. "In framing an instrument, which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also; . . ." *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 355 (1827). The line of cases addressing congressional jurisdiction to legislate under the Commerce Clause has departed from those perpetual principles. Overruling precedent is thus appropriate. As this Court has stated, it will not hesitate to overrule precedent "when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause." *Garcia*, 469 U.S at 557.

The modern realities of our national government reflect that the fears of the Founding Fathers are now manifesting themselves. In recent years, Congress has become increasingly less representative of state and local interests and more responsive to national constituencies. *Garcia*, 469 U.S. at 565 (Powell, J, dissenting). State officials, knowing that Congress will eventually make decisions on difficult issues, are reluctant to tackle difficult issues for fear of the political consequences. *See New York v. United States*, 112 S. Ct. 2408, 2432 (1992). As a

result, Congress continues to exercise more powers not granted to it in the Constitution.

The Gun-Free School Zones Act may be based upon good intentions. These intentions, however, are irrelevant. "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 112 S. Ct. at 2434; *see also Dolan v. Tigard*, 1994 U.S. Lexis 4826 at *38, No. 93-518 (U.S., June 24, 1994) (strong public desire will not warrant a shorter cut than the constitutional way); *Reid*, 354 U.S. at 35 n. 62.

Across this country there is a sense that people have lost control over their government. In the last election, 121 new members of Congress were elected in a futile struggle to regain control of the federal government. Efforts to impose term limits on Congressmen, a subject this Court will soon consider, is another manifestation of that struggle. This struggle should be unnecessary. Congress should be restrained to its proper role under the Commerce Clause.

Respectfully submitted,

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